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Constitutional Law—Equal Protection and School Funding in Arkansas

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NOTES

CONSTITUTIONAL LAW—EQUAL PROTECTION AND SCHOOL FUNDING IN ARKANSAS. *Dupree v. Alma School District No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

Members of the Arkansas State Board of Education appealed a Pulaski County Chancery Court decision that the formula distributing state funds to Arkansas school districts for the operation of their primary and secondary schools[1] and their vocational-technical

1. The School Finance Act of 1979, 1979 Ark. Acts 1100, sets out the formula by which Arkansas' Minimum Foundation Program is distributed. Each school district is eligible to receive "base aid" and may be eligible to receive equalization aid under this act. For the base aid appropriation each district is guaranteed the amount of base aid it received in 1978-79 plus a sum calculated by multiplying the previous year's base aid appropriation by the ratio of the previous year's average daily membership (ADM) to the second previous year's ADM. The ADM is calculated by dividing the sum of the daily enrollments for the first three-quarters of the year by the number of school days during the first three-quarters of the year in each school district. Districts with an ADM of less than 350 receive an adjustment, although there is a maximum of 350 ADM for such districts.

Under Act 1100 all money appropriated must first be used to pay base aid, then provisions for an emergency hardship fund, appropriations for isolated districts and the Department of Corrections School District, and incentives for consolidation. All funds remaining are paid in equalization aid. Equalization aid is paid through two formulas. First, one-half of all available equalization funds are paid by dividing that total by the state total ADM. The quotient obtained is paid to each district per its ADM.

The other half of equalization aid is paid to districts according to their resource determination rate. This figure is obtained by first dividing the state total property assessment by each county's total property assessment. This index number is then multiplied by the total state assessed valuation (consisting of all real and personal property, utilities and carriers, and mineral lease valuations). This figure is the county-charged assessed valuation; however, this figure cannot be less than 90% nor more than 125% of each county's actual assessment. Then each district's charged assessed valuation is computed by its proportion of actual county assessed valuation for each county in which it operates.

Each district's charged assessed valuation is then (1) multiplied by forty-five mills which product is (2) added to the previous year's adjusted base aid which sum is (3) divided by the previous year's ADM. This figure is the district resource determination rate.

The districts are ranked according to their resource determination rate with the highest being 100%. The remaining one-half of equalization aid is paid out so that the district occupying the fifth percentile receives four times the amount of the district at the ninety-fifth percentile, and all other districts receive aid in proportion to that ratio. In addition, $2,000,000 was appropriated in 1979-80 and 1980-81 to be added to those districts with the lowest resource determination rates so that "all participating districts will have the same 'resource rate'."

schools[2] violated the state constitution's equal protection[3] and public education[4] provisions. The appellees, eleven school districts,[5] contended that the amount of money available to each school district under the formula was a function of the valuation of property within the district. Since the current financing scheme did not sufficiently account for the varied property values across the state, per pupil expenditures among the districts varied to a degree that violated the state constitution.[6]

The Arkansas Supreme Court affirmed the chancellor's holding concluding that there was no legitimate state purpose to support the acts in question and that the financing system bore no rational relationship to the needs of the schoolchildren in each district. Even if each district was able to meet minimal constitutional educational requirements, the constitution still demanded equal educational op-

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2. Act of April 11, 1975, 1975 Ark. Acts 1004, provides for state funding for vocational-technical schools. Section 1 appropriates $12,500,000 for fiscal years 1975-76 through 1976-77 for this purpose, and section 7 provides, in pertinent part, that the funds, "shall not be used to supplant existing Federal funds for secondary vocational education programs, but may be used to increase support of existing programs. The Vocational Division of the State Department of Education shall, pursuant to regulations of the State Board for Vocational Education, reimburse school districts for the cost of secondary vocational education programs, at not less than fifty percent (50%) of the cost of said programs."

3. ARK. CONST. art. II, §§ 2, 3, 18. Section 2 provides: "All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights the governments are instituted among men, deriving their just powers from the consent of the governed."

Section 3 provides: "The equality of all persons before the law is recognized, and shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity, nor exempted from any burden or duty, on account of race, color or previous condition."

Section 18 provides: "The General Assembly shall not grant to any citizen or class of citizens privileges or immunities which upon the same terms shall not equally belong to all citizens."

4. ARK. CONST. of 1874, art. xiv, § 1 (1968) provides:

> Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education. The specific intention of this amendment is to authorize that in addition to existing constitutional or statutory provisions the General Assembly and/or public school districts may spend public funds for the education of persons over twenty-one (21) years of age and under six (6) years of age, as may be provided by law, and no other interpretation shall be given to it.

5. The school districts were Alma, Mulberry, Van Buren, Conway, Lake Hamilton, Sheridan, Paris, Cabot, Bryant, Greenwood, and Mansfield.

6. ARK. CONST. art. II, §§ 2, 3, 18; art. XIV, § 1. *See supra* notes 3 and 4.

portunity. The court further concluded that court ordered statewide property reassessment[7] would not solve the inequity. Finally, the state was ordered to devise a more equitable formula, since it bore ultimate responsibility for public education. *Dupree v. Alma School District No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983).

The question in *Dupree*, whether a state school funding formula based on local property values violates state equal protection guarantees, presented the opportunity for the Arkansas Supreme Court to interpret its own constitutional equal protection provisions independently[8] of a challenge under the fourteenth amendment of the United States Constitution.[9] The state courts' rulings on this issue have followed the equal protection analysis developed by the United States Supreme Court.[10] Thus it is helpful to examine the basic features of that analysis.

The fourteenth amendment to the United States Constitution was ratified in 1868 in order to vest the protection given to Blacks by the Civil Rights Act in 1866[11] in the Constitution.[12] The equal pro-

7. Public Service Commission v. Pulaski County Equalization Board, 266 Ark. 64, 582 S.W.2d 942 (1979) (all property values across the state must be reassessed to reflect current market value).

8. In San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), the United States Supreme Court stated that education did not merit heightened review under equal protection analysis and that the Texas school funding system met the requirements of the rational relationship standard of review. *See infra* text accompanying notes 56 to 69.

9. U.S. CONST. amend. XIV, § 1, provides in part that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

10. The California Supreme Court stated that is equal protection guarantees were "substantially the equivalent" of the equal protection clause of the fourteenth amendment. Serrano v. Priest, 18 Cal. 3d 728, 764, 135 Cal. Rptr. 345, 366, 557 P.2d 929, 949 (1977). Other states have applied two or three tier analyses that parallel the federal model. *See, e.g.*, Lujan v. Colorado State Board of Education, 649 P.2d 1005, 1014 (Colo. 1982); Horton v. Meskill, 172 Conn. 615, 639, 376 A.2d 359, 370-71 (1977); McDaniel v. Thomas, 248 Ga. 632, 647, 285 S.E.2d 156, 166-67 (1981); Board of Educ., Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 27, 42, 439 N.E.2d 359, 365, 453 N.Y.S.2d 643, 650 (1982); Board of Educ. of City School District of City of Cincinnati v. Walter, 58 Ohio St.2d 368, 373, 390 N.E.2d 813, 817 (1979), *cert. denied*, 444 U.S. 1015 (1980); Olsen v. State, 276 Or. 9, 15-16, 554 P.2d 139, 145 (1976); Northshore School Dist. No. 417 v. Kinnear, 84 Wash. 2d 685, 725, 530 P.2d 178, 198 (1974), overruled in part by Seattle School Dist. v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978); Pauley v. Kelly, 255 S.E.2d 859, 864 (W.Va. 1979); Washakie County School Dist. No. One v. Herschler, 606 P.2d 310, 333 (Wyo. 1980) *cert. denied sub nom*, Hot Springs County School Dist. No. One v. Washakie County School Dist. No. One, 449 U.S. 824 (1980). *But see* Thompson v. Engelking, 96 Idaho 793, 802, 537 P.2d 635, 645 (1975) (Idaho never adopted strict scrutiny standard of review for equal protection analysis).

11. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. §§ 1982, 1987-92 (1976 & Supp. 1981)).

12. U.S. CONST. amend. XIV, § 1.

tection provisions of the amendment[13] were designed to protect Blacks in the post-Civil War South from discriminatory state legislation.[14] However, the equal protection clause of the fourteenth amendment is not construed to bar all state discrimination,[15] since it is recognized that a state can classify its residents through its police power in support of legitimate state interests.[16] Generally, great deference is accorded state legislatures in exercising this function,[17] but certain classifications are subject to more rigorous review by the Court.[18] Today, three levels or standards of review are recognized in the Court's analysis of discriminatory legislation.[19]

The Supreme Court requires that legislative distinctions must have a "fair and substantial relation to the object of the legislation."[20] In addition, facially impartial legislation must be applied equally.[21] Nor may legislation invidiously discriminate between persons in similar circumstances.[22] This rational relationship stan-

13. *See supra* note 9 and accompanying text.

14. K. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 135-138 (1965); H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 466-68 (1975).

15. *See, e.g.*, Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356, 359 (1973) (upholding amendment to state constitution which prohibited taxation on individual personal property but allowed taxation of corporate personal property).

16. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949) (state could prohibit advertising for hire on delivery trucks to reduce distractions to urban pedestrian and vehicle traffic); Gulf, C. & S. F.R. Co. v. Ellis, 165 U.S. 150, 155 (1897) (fourteenth amendment does not withhold from states the power of classification, though such classification must not be made arbitrarily).

17. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420, 425 (1961) (fourteenth amendment permits the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others).

18. New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

19. *See generally* Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976); Fox, *Equal Protection Analysis: Laurence Tribe, The Middle Tier, and the Role of the Court*, 14 U.S.F.L. REV. 525 (1980) [hereinafter cited as Fox].

20. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

21. Facially impartial legislation does not draw impermissible classifications solely by the language of the statute. However, it may do so by application of the statute. *See, e.g.*, Yick Wo v. Hopkins, 118 U.S. 356 (1886) (ordinance prohibiting operation of laundries housed in wooden buildings held unconstitutional because most laundries of this type were owned by Chinese residents while most other laundries were owned by non-Chinese residents).

22. Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955) (regulations applicable only to opticians but not optometrists or opthamologists held valid because the two classes were dissimilar and the equal protection clause prohibits only invidious discrimination); Railway Express Agency v. New York, 336 U.S. 106 (1949) (trucks advertising for hire were in a dissimilar situation than trucks advertising their owner's goods and services).

dard is the minimal equal protection test that challenged legislation must pass. It is based on a court's deference to legislative expertise, resulting in a presumption of constitutionality,[23] and requires only that the classification at issue be rational in relation to a legitimate public purpose.[24]

The Court applies a higher standard of review when legislation affects fundamental rights[25] or burdens a suspect class.[26] Under this strict scrutiny standard, legislation is not accorded a presumption of constitutionality, and the state must demonstrate a compelling purpose to justify the classification.[27] The state must also show that the legislation is narrowly tailored to fit its objectives and that no less restrictive methods are available.[28] Suspect classes have been identified in legislation based on race,[29] alienage,[30] or national origin.[31]

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23. Dandridge v. Williams, 397 U.S. 471, 485 (1970) (where state put a ceiling on welfare benefits regardless of household size it was held that the fourteenth amendment gives federal courts no power to impose upon the states their views of what constitutes wise economic or social policy); McGowan v. Maryland, 366 U.S. 420, 425 (1961) (state has wide scope of discretion in deciding what products could and could not be sold on Sunday).

24. *Dandridge*, 397 U.S. at 485; *Williamson*, 348 U.S. 483; *Railway Express Agency*, 336 U.S. 106. *See also* United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 174 (1980) (any conceivable rational relationship will suffice (citing Lindsley v. National Carbonic Gas Co., 220 U.S. 61, 78-79 (1911)).

25. Fundamental rights are those rights "explicitly or implicitly guaranteed by the Constitution." San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 33-34 (1973). *See infra* text accompanying notes 63 to 66.

26. Suspect classes are "discrete and insular minorities," Graham v. Richardson, 403 U.S. 365, 372 (1971) (citing United States v. Carolene Products Co., 304 U.S. 144, 152-153 n.4 (1938)), and are characterized by "a history of purposeful unequal treatment" or "political powerlessness" or an immutable characteristic. *Rodrigiuez*, 411 U.S. at 28. *See also* Note, *Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model*, 90 YALE L.J. 912, 917-18 (1980).

27. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (state one-year residency requirement for welfare benefits required a showing of state's compelling interest since it inhibited interstate travel, a fundamental right); Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (state must demonstrate a compelling interest to justify residency requirement for voting eligibility).

28. *Dunn*, 405 U.S. at 343 (state voting residency requirement, while protecting important state interests, was not valid since the state could not demonstrate that no less drastic means existed to fulfill the objective); *Shapiro*, 394 U.S. at 634.

29. Loving v. Virginia, 388 U.S. 1 (1967) (state antimiscegenation statute); Bolling v. Sharpe, 347 U.S. 497 (1954) (racially segregated schools in District of Columbia violated equal protection).

30. Graham v. Richardson, 403 U.S. 365 (1971) (state law denying welfare benefits to aliens in order to maintain fiscal integrity was not based on a compelling interest). *But see* Ambach v. Norwick, 441 U.S. 68 (1979) (state may deny employment as a public school teacher to aliens); Mathews v. Diaz, 426 U.S. 67 (1976) (federal government may deny government medical insurance program to aliens because Congress is given power over immigration and naturalization by the Constitution).

Legislation which burdens a fundamental right[32] is also strictly scrutinized. The right to vote,[33] the right to interstate travel,[34] and the right of choice in intimate personal matters[35] have been identified as fundamental for purposes of equal protection analysis; however, economic interests are not fundamental rights.[36] The key to discovering fundamental rights lies not in the social importance of an asserted right, but in whether it is "explicitly or implicitly guaranteed by the Constitution."[37]

The Court has expressly recognized an intermediate standard of review, falling between the rational relationship and strict scrutiny standards.[38] The salient feature of this standard of review is the addition of a means-oriented branch of analysis. Under the two-tier model, once it was determined that the purpose of classificatory legislation was legitimate, that is, that it did not affect a fundamental right or a suspect class, then almost any set of facts was sufficient to show that the means was rationally related to the asserted state purpose.[39] Conversely, if the strict scrutiny standard was found to apply, almost no set of facts could be found to justify the legislation.[40]

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31. Oyama v. California, 332 U.S. 633 (1948) (state law prohibiting ownership of land by citizen who was the son of a resident alien held violative of equal protection guarantees).

32. *See supra* note 25.

33. *Dunn*, 405 U.S. 330 (a one-year residency requirement for voting eligibility held invalid); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote held too important to be conditioned upon payment of a state poll tax).

34. *Shapiro*, 394 U.S. 618 (a one-year residency requirement for welfare benefits burdens right to interstate travel). *But see* Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974) (*Shaprio* did not declare such requirements to be *per se* unconstitutional; only where legislation penalizes exercise of right to interstate travel does strict scrutiny apply). *See also* Sosna v. Iowa, 419 U.S. 393 (1975) (state court jurisdictional requirement of one-year residency in divorce action upheld because relief sought was not absolutely denied and state had sufficient interest in requiring indications of appellant's intent to remain in the state before it exercised control over her legal relations).

35. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (Texas criminal abortion statute, excepting criminality only for life-saving abortions, held unconstitutional invasion of appellant's personal right to choose whether or not to have a child); Skinner v. Oklahoma, 316 U.S. 535 (1942) (state law authorizing sterilization of persons convicted twice of crimes involving moral turpitude, except for embezzlers, struck down under strict scrutiny).

36. *Dandridge*, 397 U.S. 471 (1970) (state statute setting upper limit to federal welfare assistance based on number of family members held valid under rational relationship standard).

37. *Rodriguez*, 411 U.S. at 33.

38. *See* Craig v. Boren, 429 U.S. 190 (1976) (where state law set minimum drinking age at 21 for males and 18 for females, the classification was held not to be substantially related to the important state objective of traffic safety). *See also* Fox, *supra* note 19.

39. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949).

40. The strict scrutiny standard was said to be "strict" in theory, but "fatal" in fact.

The intermediate standard, in contrast, combines a determination of the legitimacy of state objectives which an honest attempt to assess the rationality of the relationship between the means and the objectives of the legislation.[41] Classifications subject to intermediate review must "serve important government objectives and must be substantially related to achievement of those objectives."[42] This standard has been applied where a classification is based on gender,[43] and upon the unique fact situation of *Plyler v. Doe*.[44]

Equal protection challenges to school funding acts began in the late 1960's. The basic contention by the plaintiffs in these cases was that these acts violated equal protection guarantees of schoolchildren, taxpayers, or both,[45] since the total revenue available to a district was a function of the value of the property within the district, which usually varied considerably. At the time these suits were brought, every state except Hawaii financed their school systems through this combination of state and local taxation.[46] Ironically, most of these funding schemes were derived from the original efforts of New York educators in 1923 to develop a funding system which would ensure "equal educational facilities . . . at a uniform rate throughout the state in terms of the burden of taxation."[47] The New York scheme combined equalization and local incentive by guaranteeing a minimum expenditure per pupil to each district if they would tax at a minimum rate. If the revenue raised thereby failed to meet the guaranteed minimum, the state would make up the differ-

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Gunther, *supra* note 19, at 8. *But see* Korematsu v. United States, 323 U.S. 214 (1944) (state was able to show compelling interest in discriminating against persons of Japanese descent, because of feared Japanese invasion of West Coast during World War Two).

41. Fox, *supra* note 19, at 567-68.

42. Craig v. Boren, 429 U.S. at 197.

43. *Id.*

44. In Plyler v. Doe, 457 U.S. 202 (1982), the United States Supreme Court applied the intermediate standard to the question of whether a state could withhold funding from school districts that enrolled illegal aliens. While it was noted that education was not a fundamental right, the Court recognized that "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." 457 U.S. at 221. The question remains whether legislation touching an educational interest or an illegal alien class would independently trigger the Court's use of the intermediate standard. *See*, *The Supreme Court 1981 Term*, 96 HARV. L. REV. 4, 134 (1982).

45. *See, e.g.*, Shofstall v. Hollins, 110 Ariz. 88, 89, 515 P.2d 590, 593 (1973); *Northshore* 530 P.2d at 181.

46. Coons, Clune, and Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305, 312 (1969).

47. J. COONS, W. CLUNE, AND S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 63-64 (1970) (quoting G. STRAYER AND R. HAIG, FINANCING OF EDUCATION IN THE STATE OF NEW YORK 173 (1923)).

ence. Otherwise, any amount the local district taxed above the minimum could be spent on its schools as the district pleased.[48] Because of the difference in value of different types of land, the amount of money raised by the same millage would vary from district to district. Conversely, it would take a higher millage to raise a certain amount of money in a property poor district than it would in a richer district.[49]

The first cases to challenge these funding formulas under equal protection analysis appeared in federal district courts in Illinois and Virginia.[50] In *McInnis v. Shapiro*[51] the Illinois system was challenged as not being rational since expenditure was not based on the "needs" of the various districts. The district court ruled that no cause of action was stated due to the non-justiciability of the issue.[52] The court disputed the plaintiffs' assumption that educational "needs" could be realistically translated into monetary terms, at least in comparing one district's needs with those of another. Consequently, it refused to rule on the merits of the issue due to the lack of judicial standards.[53] Concerning the constitutional issue, the court concluded that the legislation met the requirements of the rational relationship standard due to the legislature's desire to allow local districts to determine their own tax rate in proportion to the importance they placed on education.[54] In 1969 a district court in Virginia agreed with the rationale behind *McInnis* adding that "the courts have neither the knowledge, nor the means, nor the power to tailor public moneys [to fit school needs]."[55]

In 1973 the United States Supreme Court seemingly foreclosed further atacks on school funding acts under the strict scrutiny standard by its decision in *San Antonio Independent School District v. Rodriguez*.[56] The five member majority applied the rational relationship standard of equal protection analysis and because neither a suspect class nor a fundamental right was involved, reversed a lower court holding that strict scrutiny of the funding system was

48. *Id.* at 64. This type of program is often called the Minimum Foundation Program.
49. *E.g.*, *Horton*, 376 A.2d at 367.
50. McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom*, McInnis v. Ogilvie, 394 U.S. 322 (1969); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969).
51. 293 F. Supp. 327 (N.D. Ill. 1968).
52. *Id.* at 329.
53. *Id.* at 335-36.
54. *Id.* at 333.
55. *Burruss*, 310 F. Supp. at 574.
56. 411 U.S. 1 (1973). *See also*, *Herschler*, 606 P.2d at 319.

required.[57]

First, the Court distinguished *Rodriguez* from other cases where wealth was a factor in creating a suspect class[58] by noting that the deprivation in *Rodriguez* was relative, not absolute.[59] The complaining schoolchildren in *Rodriguez* were receiving an education that at least met the minimal requirements of the Texas constitution.[60] Further, the injured class could not be adequately defined since there was little correlation between district wealth and the personal wealth of the district's inhabitants.[61] Nor did the injured class have any of the indicia of suspectness: a history of purposeful unequal treatment or political powerlessness.[62]

The Court also declared that it was wrong to assume that fundamental rights were discerned by "the importance of a service performed by the State."[63] The proper test was "whether there is a right to education explicitly or implicitly guaranteed by the Constitution."[64] In addition, education was not made a fundamental right by its impact on an individual's ability to speak and vote.[65] While the Court was willing to gurantee those rights, it declared it would not guarantee an individual's right to the most effective development of the ability to exercise those rights.[66]

In applying the rational relationship standard, the Court noted that the judiciary should not interfere with a legislature's economic distribution function unnecessarily, and that "[n]o scheme of taxation, . . . , has yet been devised which is free of all discriminatory impact."[67] It also questioned, as did *McInnis v. Shapiro*, the validity of assuming a high correlation between expenditure and educational quality.[68] Finally, it found that the Texas formula furthered the legitimate state interest of fostering local control of public schools.[69]

As a result of *Rodriguez*, plaintiffs challenging school funding

57. 411 U.S. at 17-18.

58. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (denial of free transcript to indigent defendant on appeal of right); Douglas v. California, 372 U.S. 353 (1963) (denial of free counsel to indigent defendant on appeal of right).

59. *Rodriguez*, 411 U.S. at 19.

60. *Id.*

61. *Id.* at 26-27.

62. *Id.* at 28.

63. *Id.* at 30.

64. *Id.* at 33.

65. *Id.* at 35.

66. *Id.* at 36.

67. *Id.* at 40.

68. *Id.* at 43.

69. *Id.* at 55. *Accord McInnis*, 293 F. Supp. at 335-36.

acts began to seek relief from state courts. *Serrano v. Priest*[70] was the first case to rule on the constitutionality of such acts under a state constitution. It also ruled on the issue under the fourteenth amendment since the issue had not yet been decided by *Rodriguez*. Without the aid of *Rodriguez*'s guidelines in discerning fundamental rights,[71] the *Serrano I* court concluded that education was a fundamental right under both the United States and California constitutional because (1) it was a determinant "of an individual's chances for economic and social success;" (2) because it influenced an individual's development as a citizen; and (3) because the United States Supreme Court in *Brown v. Board of Education of Topeka* had declared that educational opportunity, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[72] Having decided to strictly scrutinize California's funding formula, the court held that attempting to preserve local control of school districts was not a sufficient justification,[73] since centralized financing would not necessarily deprive school boards of meaningful power.[74] Also, for poorer districts the notion of local control over tax millages was an illusion since they were already taxed to their constituent's limits.[75] Finally, because education was unique among public services, there was no need to fear equal protection challenges to inequities in other local services, such as fire or police protection.[76]

Rodriguez, of course, cast doubt on *Serrano I*'s holding concerning the fourteenth amendment and its method of determining fundamental rights. Thus, relying on the dicta in *Rodriguez*,[77] courts in Michigan,[78] West Virginia,[79] and Wyoming[80] found that

70. 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971). [hereinafter cited as *Serrano I*].

71. *See supra* text accompanying notes 63 to 66.

72. *Serrano I*, 487 P.2d at 1255-57 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

73. *Id.* at 1260.

74. *Id.*

75. *Id.*

76. *Id.* at 1263.

77. 411 U.S. at 33 (fundamental rights are those explicitly or implicitly guaranteed by the Constitution).

78. Milliken v. Green, 389 Mich. 1, 27, 203 N.W.2d 457, 468-69 (1972). However, in Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973), the Michigan court reversed itself and, accepting the *McInnis* rationale, declared that since there was no standard by which equality in education could be measured, it "could not responsibly declare the present system of financing schools unconstitutional." 212 N.W.2d at 719-20.

79. *Pauley*, 255 S.E.2d 859.

80. *Herschler*, 606 P.2d 310.

the explicit provisions for education in their state constitutions indicated that education was a fundamental right. The California Supreme Court followed a similar rationale in *Serrano v. Priest*,[81] which challenged the funding system as amended in response to *Serrano I* solely under California's equal protection provisions. These cases held that no compelling end was shown by the state to justify its classification based on wealth,[82] or that the state had not shown that less restrictive means were not available to achieve its objectives.[83]

At the same time, some courts disputed the *Rodriguez* test[84] for fundamental rights, at least as applied to their constitutions.[85] These courts generally held that the rational relationship standard was the proper one to apply and in so doing found that local control was a legitimate state interest supporting the challenged legislation.[86] Additionally, some courts upholding the constitutionality of their funding systems implied that the outcome of the case rested partly on the inability of courts to convert educational "needs" into empirical data, for the purpose of comparing educational opportunities between districts.[87]

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81. 18 Cal. 3d 728, 135 Cal. Rptr. 345, 557 P.2d 929 (1977), *cert. den. sub nom*, Clowes v. Serrano, 432 U.S. 907 (1977). [hereinafter cited as *Serrano II*]. The court in *Serrano II* did not adopt the *Rodriguez* test but held that education was a fundamental right because it went to the "core of a free and representative form of government." 557 P.2d at 952. *Accord Horton*, 376 A.2d at 373.

82. *See Pauley*, 255 S.E.2d at 878; *Horton*, 376 A.2d at 371; *Milliken*, 203 N.W.2d at 470.

83. *See, e.g.*, *Herschler*, 606 P.2d at 335.

84. *See supra* note 77.

85. *See, e.g.*, Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (the right to hold property is guaranteed by the federal Constitution but is not likely to be accorded such preferred treatment). *Accord* Thompson v. Engelking, 537 P.2d at 645; Olsen v. State, 276 Or. 9, 554 P.2d 139, 144 (1976) (*Rodriguez* would make Oregon's constitutional guarantee of the right to sell and serve liquor a fundamental right). *See also Lujan*, 649 P.2d at 1017; *Walter*, 390 N.E.2d at 818-19 (state constitutions are not documents of limited power, thus some provisions of the constitution are merely legislative mandates); McDaniel v. Thomas, 248 Ga. 632, 647, 285 S.E.2d 156, 167 (1981) (*Rodriguez*, if not controlling, is persuasive authority for the proposition that education is not a fundamental right under the Georgia Constitution); *Nyquist*, 439 N.E.2d at 365 (*Rodriguez* controls, citing Matter of Levy, 38 N.Y.2d 653, 658, 345 N.E.2d 556, 558 382 N.Y.S.2d 13, 15 (1976)). *See generally* Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 97-99 (1982).

86. *See Lujan*, 649 P.2d at 1023; *Nyquist*, 439 N.E.2d at 366; *Walter*, 390 N.E.2d at 820. *Cf. Olsen*, 554 P.2d at 145 (court must weigh detriment to children against justification offered by state); Robinson v. Cahill, 303 A.2d at 282 (ultimately court must decide whether state action is arbitrary). *See also* Thompson v. Engelking, 537 P.2d at 645 (Idaho never adopted the strict scrutiny test).

87. *See, e.g.*, Thompson v. Engelking, 537 P.2d at 642; *Milliken* 212 N.W.2d at 719.

However, some courts have used the criteria set out in their constitutional education provisions as the standard of judicial review, rather than traditional equal protection criteria. The New Jersey Supreme Court found that education was not a fundamental right but that a "thorough and efficient" education was mandated by the state's constitution.[88] Arizona, on the other hand, found education to be a fundamental right but held that "rational and reasonable" educational standards were all that were required within that right.[89] In another case, the Georgia Supreme Court held that it was impossible to tell whether education was a fundamental right under their state constitution, but that the absence of an affirmative duty to equalize educational spending in the constitution's education article was constitutionally significant.[90] Other courts looked to the legislative history of their constitutional education provisions and found that there was no requirement of equality of expenditure.[91]

Against this background came the challenge to school funding in Arkansas. Like most other states, Arkansas depends on a combination of state and local money to finance its schools. Originally, revenue came from federal land grants in support of education,[92] but by 1874 school revenues were derived from a permanent school fund which remained from the land grants, a two mill statewide property tax, a one dollar poll tax, and local property taxes not exceeding five mills. Apportionment of these funds was based on each district's share of each county's juvenile population.[93] Between 1875 and 1926 local districts carried much of the burden of school financing and various constitutional amendments increased the permissi-

88. Robinson v. Cahill, 303 A.2d at 294 (education is not a fundamental right but the inequities in the funding system violate a constitutional mandate that the school system be "thorough and efficient").

89. Shofstall v. Hollins, 515 P.2d at 592 (education is a fundamental right but if the school system meets constitutional mandate that it be free, uniform, open six months per year and available to anyone aged six to twenty-one then the system need only be rational and reasonable).

90. *McDaniel* 285 S.E.2d at 166 (funding system held constitutional since it sought to promote local control).

91. Thompson v. Engelking, 537 P.2d at 649 (education article drafted so that school funding need not be based exclusively on local taxation); *Nyquist*, 439 N.E.2d at 367 (education article sought to assure statewide minimal acceptable facilities and services). *Accord Walter*, 390 N.E.2d at 825 (equal protection and education clauses are not mutually supportive; education clause only requires that districts meet minimal standards); *Olsen*, 554 P.2d at 148; *Northshore*, 530 P.2d at 201 (that school districts vary in size and taxable property does not signify that the system of public schools is neither general nor uniform).

92. Dial, Historical Development of School Finance in Arkansas, 1819-1970 59-60 (1971) (Ed.D. dissertation, University of Arkansas).

93. *Id.* at 160.

ble local millage rate to eighteen mills.[94] Finally, in 1947 the statewide real property tax in support of education was removed and in 1948 amendment forty to the Arkansas Constitution removed all millage restrictions from local school taxes.[95] Arkansas' version of the Minimum Foundation Program (MFP)[96] was first implemented in 1951[97] and has been reformulated at various times, concluding in the present act.[98]

In 1978 state revenues provided about fifty-two percent of the total school revenue in Arkansas and local revenues about thirty-eight percent. The remaining ten percent came from federal sources.[99] In that same year seventy-seven percent of state aid was distributed through the MFP.[100] Under the current formula,[101] each district receives a specified amount of money per pupil based on the district's daily school membership.[102] Once this "base aid" and other stipulated appropriations are paid, the remainder of the MFP appropriation is paid out in "equalization aid" based on a district's level of financial resources, namely the property valuation in the district.[103] For 1979-80 equalization aid amounted to 6.8% of the MFP program.[104] In addition, funding on a per pupil basis was held at the 1978-79 level,[105] regardless of the changing fortunes of the district, although the total amount a district may receive would depend on the enrollment from year to year.[106] Because school districts could supplement their state aid by taxing local property, per pupil revenues varied widely in the state, from $2,378 to $873 in 1978-79. In addition, the assessed property valuation per pupil that year ranged from $73,773 to $1,853.[107] The appellees in *Dupree* also challenged state aid to vocational-technical schools.[108] Since the state would fund only existing vocational-technical programs,[109] it

94. *Id.* at 161, 270-71.
95. *Id.* at 511. ARK. CONST. amend. 40.
96. *See supra* note 48.
97. The Arkansas Minimum School Budget, Law, 1951 Ark. Acts 278.
98. The School Finance Act of 1979, 1979 Ark. Acts 1100.
99. Dupree v. Alma School District No. 30, 279 Ark. 340, 343, 651 S.W.2d 90, 91 (1983).
100. *Id.*
101. *See supra* note 1.
102. 1979 Ark. Acts 1100, § 2(J).
103. 1979 Ark. Acts 1100, § 3(B).
104. 279 Ark. at 344, 651 S.W.2d at 92.
105. 1979 Ark. Acts 1100 § 2(I)(1).
106. 1979 Ark. Acts 1100, § 2(J).
107. 279 Ark. at 344, 651 S.W.2d at 92.
108. *Id.* at 343, 651 S.W.2d at 92.
109. 1975 Ark. Acts 1004, § 7.

was claimed that poorer districts were denied the benefit of state aid since they could not raise the money necessary to establish a vocational-technical program.[110]

In affirming the chancellor's ruling, the Arkansas Supreme Court held that the equal protection and education provisions in the state constitution complemented each other.[111] In applying the equal protection provisions, however, the court found it unnecessary to answer the question of whether education was a fundamental right in Arkansas.[112] Since the amount of funding was based on local property valuations it bore no rational relationship to a district's needs,[113] "as reflected by staff, class size, curriculum, remedial services, facilities, materials and equipment."[114] Since the funding acts did not account for the needs of the school districts in determining disbursements, there was no constitutional basis for them and the challenged legislation failed regardless of which standard of review was applied.[115] Nevertheless, it is significant that the majority stressed the importance of education by quoting from the Arkansas Constitution as follows: "Intelligence and virtue being the safeguards of liberty and bulwark [sic] of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools . . ."[116] and by stating their own belief that "the right to equal educational opportunity is basic to our society."[117]

The Arkansas court relied on *Serrano I* to dispense with the appellant's contention that the preservation of local control of school systems was a legitimate goal of the legislation.[118] The court noted that equalization of financing did not "dictate that local con-

110. 279 Ark. at 344, 651 S.W.2d at 92.

111. *Id.*; *accord Pauley*, 255 S.E.2d at 878.

112. 279 Ark. at 346, 651 S.W.2d at 93.

113. *Id.* at 344, 651 S.W.2d at 92.

114. *Id.*; *accord Horton*, 376 A.2d at 368. *Contra Rodriguez*, 411 U.S. at 43; Thompson v. Engelking, 537 P.2d at 641; *Milliken*, 212 N.W.2d at 719 (underlying the decisions of these courts was the premise that equality in educational opportunity cannot be determined merely by comparing relative expenditure in certain key categories).

115. *Dupree*, 279 Ark. at 345, 651 S.W.2d at 93.

116. *Id.* at 346, 651 S.W.2d at 93 (quoting ARK. CONST. art. XIV, § 1).

117. *Id.*; *cf. Serrano II*, 557 P.2d at 952 (Cal. 1977). "In applying our state constitutional provisions guaranteeing equal protection of the laws we shall continue to apply strict and searching judicial scrutiny to legislative classifications which, because of their impact on those individual rights and liberties which lie at the core of our free and representative form of government, are properly considered fundamental."

118. 279 Ark. at 346, 651 S.W.2d at 93.

trol must be reduced,"[119] and that control over tax rates was illusory for poor districts since they had to tax at high levels just to maintain their levels of service.[120] The appellant's argument that the state constitution only required that each district provide a suitable basic education was dismissed because "[b]are and minimal sufficiency does not translate into equal educational opportunity."[121] Further, statewide property reassessment[122] would not solve the inequity because the gap between rich and poor districts would still exist.[123] Finally, the court noted that the legislature must rectify the situation since the state has the ultimate responsibility for maintenance of the education system.[124]

It is difficult to determine which standard of review the Arkansas Supreme Court applied in *Dupree*. Justice Purtle noted in his concurring opinion that the court did not declare education to be a fundamental right under the Arkansas Constitution,[125] thus triggering strict scrutiny of the legislative scheme. Yet it is equally clear that the Arkansas court went further than the cursory examination usually afforded social and economic legislation.[126] Indicative of the court's willingness to go beyond a perfunctory examination of the legislation is its characterization of education as "the essential prerequisite that allows our citizens to be able to appreciate, claim and effectively realize their established rights."[127] Such language is reminiscent of *Brown v. Board of Education*,[128] where it was noted that education "is the very foundation of good citizenship,"[129] and where made available, "is a right which must be made available to

119. *Id.*

120. *Id.*

121. *Id.* at 347, 651 S.W.2d at 93.

122. Arkansas Public Service Commission v. Pulaski County Bd. of Equalization, 266 Ark. 64, 582 S.W.2d 942 (1979).

123. *Dupree*, 279 Ark. at 347, 651 S.W.2d at 93.

124. *Id.* at 349, 651 S.W.2d at 95.

125. *Id.* at 349, 651 S.W.2d at 97 (Purtle, J., concurring). The court thus refused to follow *Serrano II*, 135 Cal. Rptr. 345, 557 P.2d 929, Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977), and Pauley v. Kelly, 255 S.E.2d 859 (W.Va. 1979), on this issue.

126. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949) (where legislature sought to diminish street advertising thought to be distracting to motorists, legislature could have concluded that business vehicles displaying advertising from other businesses for profit was more distracting than business vehicles advertising their own products or services). *See also* United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980) (it was constitutionally irrelevant whether Congress in fact considered the purported justification in support of legislative classification if the justification was reasonable).

127. *Dupree*, 279 Ark. at 346, 651 S.W.2d at 93.

128. 347 U.S. 483 (1954).

129. *Id.* at 493.

all on equal terms."[130]

In *Dupree* the exercise of this more extensive review of the school funding acts is also explained by article XIV, section 1 of the Arkansas Constitution.[131] This section places on the legislature the burden of meeting Arkansas' educational needs. In concert with the language of article II, sections 2, 3, and 18, these needs must be met equally for all citizens. Thus, this situation differs from a review of purely economic legislation, in which case the legislature is able to set its own standards. Here, the legislature must meet the mandated standards of article XIV, section 1[132] and provide for Arkansas' educational needs. Coupled with the equal protection provisions, the legislation purporting to satisfy the education mandate must be analyzed to see if indeed it is fulfilling that mandate. In *Dupree* the justification of local control did not assist in meeting the needs of all Arkansas school children equally. It was therefore unrelated to the true purpose of the funding statute, which was to satisfy the constitution's education article.

What direction, then, did the court give the legislature in reformulating the funding system, especially in light of its declaration that it will not undertake a search for tax equity, a job for which it believes the legislature is better suited.[133] At least one justice stated that he could not justify any formula that did not distribute funds on a per pupil basis,[134] though such a system demands that school districts be the same size, with reapportionment taking place at specified intervals.[135] Even then, guidelines would have to be established to compensate for the varying costs of similar services across the state, for example, between rural and urban areas.

Another approach to the problem would be the elimination of the disparities in district needs, which is the focus of *Dupree*.[136] This approach would require (1) identification of a district's needs, (2) a decision as to whether such needs can be rectified by additional money, and (3) arranging those needs in order of priority.

A third alternative is to modify the current scheme, which does not seem facially defective, given the equalization provision in the act. Yet because of the requirement that 1978-79 funding levels be

130. *Id.*
131. *See supra* note 4.
132. *Id.*
133. *Dupree*, 279 Ark. at 349-50, 651 S.W.2d at 95 (quoting *Serrano II*, 557 P.2d at 946).
134. *Id.* at 351, 651 S.W.2d at 96 (Hickman, J., concurring).
135. *Id.* at 352, 651 S.W.2d at 96-97 (Hickman, J., concurring).
136. Id. at 342, 345, 346, 651 S.W.2d at 91, 93.

maintained (the hold-harmless provision),[137] and the priority given to other specific appropriations, equalization aid accounted for only 6.8% of the amount appropriated by the legislature in 1979-80. If the equalization provision were allowed to operate in practice as it was intended to in theory, it would ensure that each district would receive equal funding. Even so, the absence of a cap on local millage rates would allow property rich districts to continue to generate more revenue than property poor districts, leaving the scheme still vulnerable to an equal protection challenge. However, given the political considerations surrounding education issues, modification of the present system coupled with a millage cap seems more politically feasible than statewide consolidation or equalization on the basis of district needs.

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137. 1979 Ark. Acts 1100, § I(1). *See also Dupree*, 279 Ark. at 343, 651 S.W.2d at 92.